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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MARY LOIS McINTOSH,
Petitioner,
vs.
ELLA L. WIGGINS,
Respondent.
No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

PETITION FOR REHEARING.

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

With Him on Petition:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL.

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PETITION FOR REHEARING.

Respectfully Petitioner prays for a rehearing on her Petition for Writ of Certiorari.

This case presents questions never before decided by this Court:

WHAT FORCE AND EFFECT, AS RES ADJUDICATA, MAY A FEDERAL COURT GIVE TO AN ERRONEOUS PARAGRAPH OF A DECREE ENTERED BY A STATE CIRCUIT COURT IN A WILL CONSTRUCTION SUIT, WHICH PARAGRAPH FLATLY CONTRADICTS THE OPINION OF THE STATE SUPREME COURT ON APPEAL IN THE SAME CASE:

1) When on appeal the State Supreme Court states the intention correctly, but enters an order of affirmance

a) because the briefs of counsel stated the intention correctly, but did not advise the Court that the decree appealed from contradicted that intention;

b) because no point was made of the correctness of the paragraph of the decree of the State Circuit Court;

c) because the briefs of counsel had suggested that no such construction had been made; and

d) because "No judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the challenged paragraph of the decree."

2) When on appeal the State Supreme Court has stated the intention correctly, but enters an order of affirmance, and later, in a separate suit, holds that under the facts, *fraud* entered into the procurement of the final judgment in the will construction suit.

3) When on appeal, the State Supreme Court states the intention correctly, but affirms a decree, which is to the contrary, and later in a separate suit, holds that the pleadings and proof amply support a judgment declaring void the erroneous paragraph of the decree on the grounds of accident, mistake or fraud.

THE FACTS UNDERLYING THE QUESTIONS PRESENTED.

Petitioner, Mary Lois McIntosh, and Elizabeth Liggett Kennard, the successful Missouri Court Plaintiff, have identical rights under the will of John E. Liggett. They were contingent remaindermen under his will, and on the death of a life tenant (Dolly L. Kilpatrick, Petitioner's mother) property of the value of many hundreds of thousands of dollars *vested* in each of them, as the *heirs of her body.*

The Supreme Court of Missouri has so ruled (Opinion in *Kennard vs. Wiggins,* R., p. 361).

The Court below has accepted that ruling (123 Fed. [2d] 316, p. 322; R., p. 298).

Nevertheless, Respondent, Ella L. Wiggins, in violation of her father's will, has claimed and held the property which vested under the will, in equal shares in Petitioner and in Mrs. Kennard.

Mrs. Kennard, in the Missouri Courts, *has* recovered judgment for her share.

Petitioner, whose lot is cast in the Federal Courts solely because of diversity of citizenship, *has not* been able, thus far, to recover her share from Ella L. Wiggins—the share which vested in Petitioner under her grandfather's will.

Yet the evidence is the same in each case.

This unique situation is caused by the action of the Court below in sustaining a plea of *res adjudicata,* which is admittedly without precedent.

The plea of *res adjudicata* is based on the following facts:

In 1923 Respondent and her two sisters brought suit in the Circuit Court of the City of St. Louis to construe the will of their father, John E. Liggett. They claimed to be

the owners of absolute estates as distinguished from life estates. Their claims were denied and they appealed to the Supreme Court of Missouri. That Court then said:

> "The trial court held that the will created life estates only in the three daughters, with contingent remainders over in their bodily heirs. *and entered a decree accordingly.* From *that decree* the daughters duly appealed the case to this court, and the single question they now present is whether *that ruling* is correct, or not" (271 S. W., p. 821; Phys. Ex., p. 84). (Emphasis throughout is ours.)

But, the trial Court had NOT "entered a decree accordingly". The 57-page decree contained a paragraph which is "untenable" under "all the rules of construction" of wills. It is the paragraph under which the Respondent claims and which she pleads as *res adjudicata.*

Notwithstanding the presence of this unjust paragraph in the decree, the Supreme Court of Missouri *entered an order of affirmance.* It did so, as the Court now holds in the *Kennard* case:

Because:

> "* * * there were statements in the briefs, in effect, *contrary* to the construction in the challenged paragraph";

Because:

> "No judge, by reading the briefs in the will construction suit appeal, *would even suspect* such a construction as that contained in the challenged paragraph of the decree";

Because:

> "No point was made as to the correctness of the construction and [because] *the briefs would suggest that no such construction was made* * * *."

In fact, the opinion of the Supreme Court of Missouri in the will construction case *stated the intention of the testator correctly*[1] before entering its order of affirmance.

Under these circumstances, is the unjust paragraph in the will construction *decree* entitled to the dignity of *res adjudicata?*

It is established in Missouri that its Supreme Court, on appeal, tries an Equity case *de novo* and renders the final judgment.

The majority opinion below sustains as *res adjudicata* the *decree* of the trial Court, not the *judgment* of the State Supreme Court.

This record, therefore, presents an important question of *res adjudicata.* The question above stated is a question of first impression on which this Court should rule for the benefit of Bench and Bar.

This question, in its three aspects, is not answered by the majority opinion below. The majority opinion below upholds the erroneous paragraph in the decree of the State Court as *res adjudicata* on the ground that a defendant is bound by a decree which is wrong as well as by a decree which is right. It cites cases which support that salutary general rule. But it does not consider the differentiating facts presented by this record.

A determination of this question does not depend upon

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[1] The Supreme Court of Missouri said in its opinion that if a daughter should die without issue, the testator intended her portion to go

> "to the survivors of my daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

To the contrary, the unjust paragraph in the decree provides that the share of a daughter dying without issue should go to

> "each of said [surviving] sisters for life, and on the death of either of them, the undivided one half interest therein of the one so dying shall go to and vest in the survivor for her life, and upon her death the whole of said property shall go to and vest absolutely in the then surviving issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita" (R., p. 358).

whether Petitioner was an adult or a minor at the time of the will construction suit. It involves merely the right of Respondent to assert any claim under the erroneous paragraph of the decree of the State Circuit Court, as opposed to the opinion of the State Supreme Court in the same case and as opposed to a subsequent decision by the State Supreme Court that said paragraph was wrong and that fraud, accident or mistake had procured an order of affirmance in the original suit.

We ask this Court to grant a Writ of Certiorari and to answer the foregoing question.

THE SAME RELIEF AWARDED TO MRS. KENNARD IN THE MISSOURI COURTS SHOULD BE AWARDED TO PETITIONER IN THE FEDERAL COURTS. THE PARTIES ARE SIMILARLY SITUATED AND ONLY MATTERS OF MISSOURI LAW ARE INVOLVED.

Our Petition charges that the decision below of the Eighth Circuit Court of Appeals conflicts, on matters of Missouri law, with the decision of the Supreme Court of Missouri in the companion case of *Kennard vs. Wiggins.*

Respondent denies that such conflict exists, asserting that the Plaintiff in the Federal Court and the Plaintiff in the State Court are "differently situated" (Respondent's Brief, p. 13).

If such conflict *does* exist the doctrine of *Erie Railroad vs. Tompkins* has been violated. And, admittedly, if the parties in the Federal and State Courts are similarly situated, such indefensible conflict *does* exist and will be righted by this Court to preserve the orderly administration of Justice in Federal and State Courts.

We, therefore, direct inquiry to the specific question:

Are the parties in the Federal case of *McIntosh vs.*

Wiggins (the case below) and the parties in the Missouri case of *Kennard vs. Wiggins* (R., pp. 356-371) differently or similarly situated?

In the so-called "will construction suit" brought by Respondent, Mrs. Wiggins, and her two sisters in 1923 in the Missouri Court, both Petitioner and Mrs. Kennard as well as other then prospective contingent remaindermen were joined as defendants.

Petitioner was then an adult; she did not appear and filed no answer.

Mrs. Kennard was a minor and necessarily she appeared by a guardian ad litem, who filed an answer for her.

In 1929 Petitioner brought an action at law in the Federal Court against Mrs. Wiggins, the Respondent here, to determine title to part of the property—the real estate—here in dispute. The District Court held that the decree in the 1923 will construction suit was *res adjudicata* of the issues then before the Court (*McIntosh vs. Wiggins,* Phys. Ex., p. *538, affirmed on a point of procedure, 57 Fed. [2d] 622).

The status of Petitioner and Mrs. Kennard, and the evidence introduced in each of their cases, is identical with the exception of the two aforesaid circumstances, to-wit: Petitioner's majority at the time of the will construction suit, and Petitioner's effort to have her title to the real estate determined in the action at law in the Federal Court.

Do those circumstances give Respondent a legal right to hold Petitioner's property in violation of the terms of the testator's will? They do, in the opinion of the majority below. They do not, in the opinion of the dissenting judge below.

The Fact That Petitioner Was an Adult Defaulting Defendant in the Will Construction Suit Does Not Preclude Her From Relief.

The Court below erred in holding that since Petitioner was an adult, her "*negligence in having failed to appear and defend her rights in the* [*will construction*] *suit was enough to prevent the* [*District Court*] *from granting her the relief which she seeks.*"

The majority opinion below completely overlooks the fact that at the time of the will construction suit in 1923, Petitioner had no "rights" and had no standing in Court to ask for any relief.

She was then merely a prospective contingent remainderman.

It is well established in Missouri, and elsewhere, that a contingent remainderman, as such, has no justiciable rights. May Petitioner, then, be charged with negligence in having not done the legally impossible?

It must be remembered that the unjust paragraph in the will construction decree was "caused" by "the action of the guardian ad litem, by his attorney, in going beyond any authority he had * * *" (Opinion in *Kennard vs. Wiggins*, R., p. 370).

Petitioner did not cause the unjust paragraph. She merely stood by while her mother and her aunts were asking for a judicial determination of the single question as to whether they took absolute estates or life estates under the will. The decree correctly provided that they took life estates only but incorrectly went further than that in providing, in the unjust paragraph, that the vesting in fee of the share of a daughter dying without issue should be postponed until the death of the last surviving daughter. This unjust paragraph went beyond the issues raised by the Petition; (to borrow the language of the minority

opinion below, R., p. 300) it "crept into the decree solely because of the request contained in the guardian ad litem's pleading * * *." It had no "other motivated basis than as a response to the guardian ad litem's pleading" (R., p. 301). That pleading, as the Supreme Court of Missouri now expressly holds, was "in excess of his lawful authority and by mistake of his counsel."

The majority opinion below does not assert that Petitioner *caused* the unjust paragraph of the decree; it says she was negligent in doing "nothing to prevent" it.

Was Petitioner's non-appearance in the will construction suit either the proximate or remote cause of the unjust paragraph? Could she have known that issues entirely foreign to the claims of the plaintiffs would be prematurely and wrongly covered by an unjust paragraph in the decree? To charge Petitioner with negligence in having failed to appear in the will construction suit is to credit her with powers not possessed by mortal man.

We submit that Petitioner was not negligent in failing to foresee the entry of the unlawful, unjust and premature paragraph in the decree.

We recognize, of course, that a defaulting defendant is bound by a judgment which is wrong, as well as by a judgment which is right. But a wrong judgment is not binding and is not res adjudicata (a) if it is beyond the issues raised by the petition, or (b) if it exceeds the jurisdiction of the Court, or (c) if fraud has entered into its procurement.

The unjust paragraph under which Respondent, Mrs. Wiggins, claims is admittedly wrong.

a) And further, we submit that the unjust paragraph is invalid and is not binding upon Petitioner, a defaulting defendant, *because it went beyond the issues raised by the petition* in the will construction suit. This question was

not even touched upon by the Court below and has not been specifically considered or decided by the Supreme Court of Missouri.

It is singularly a question of Missouri law, but it should have been decided by the Court below. Clearly, there is an hiatus in the decision below because of the failure of the Court below to consider or decide the question.

b) Further, we submit that the trial Court had no *power* to determine the devolution of the future, contingent interests, even if such questions had been put in issue by the petition. The law of Missouri clearly supports our contention on this point (see Brief in Support of our Petition for Certiorari, p. 40). But this question has not been considered or decided by either the Court below or by the Supreme Court of Missouri in the *Kennard* case. The Court below erred, however, in tacitly assuming, without deciding, that the Missouri trial Court had the power to enter the unjust paragraph, which, of course, dealt exclusively with the future devolution of contingent remainders.

Such assumption (viz., that the trial Court had the *power* to enter the unjust paragraph) is a necessary support to the charge of negligence made against Petitioner. Such assumption is unwarranted and is contrary to the law of Missouri. Therefore, the charge of negligence is without basis or support.

For these reasons alone we think (as does the dissenting judge below) that the Court erred in denying relief to Petitioner and in permitting Respondent to hold property in violation of the testator's will.

c) But there is another and controlling reason why this Court should review the action of the majority below. Its opinion states:

> "we shall accept the ruling of the Supreme Court of Missouri that the provision of the decree complained of by [Petitioner] was wrong, *but it is to be noted that that court does NOT hold that it was procured by fraud, accident or mistake, OR* that it is void *OR* is not binding upon adult defendants who were served with process in the will construction suit, but did not appear" (R., p. 298).

It is true that the Supreme Court of Missouri in the *Kennard* case does not *explicitly* hold that the unjust paragraph is void, and does not *explicitly* hold that it is not binding upon Petitioner, an adult defendant. In the *Kennard* case no such adult defendant was before the Court; the Court was not asked, and could not have been asked, to make an explicit ruling as to a party [Petitioner] who was not before the Court. The absence, therefore, of such an *explicit* ruling is not significant and is understandable.

But it is of tremendous significance that the majority below errs in holding that the Supreme Court of Missouri "does *not* hold that it [the unjust paragraph] was procured by fraud * * *."

Such holding is in direct conflict with the facts as now established by the Supreme Court of Missouri. The Supreme Court of Missouri in the *Kennard* case, in reference to what occurred in the will construction suit, *explicitly* holds:

> *"where fraud enters into the procurement of a judgment detrimental to a minor, such minor * * * has a remedy by suit in equity to set aside"* (R., p. 368).

This conflict between the decision of the Court below and the decision of the Missouri Court calls out for correction lest the doctrine of *Erie Railroad vs. Tompkins* be undermined, lest the Bar be confused and misled, lest the power of Equity be seriously limited.

Is Respondent (Mrs. Wiggins) in a position to assert that the parties are "differently situated"? May she assert that "where fraud enters into the procurement of a judgment detrimental" to an adult, such adult has *no* remedy? Will she, in Equity, be permitted to retain any of the benefits of a judgment procured by fraud? Are Courts to be instruments for the perpetuation of fraud and injustice?

We submit that the decision below is a blot upon the annals of American jurisprudence which this Court will remove.

We submit that this Court will not knowingly permit Mrs. Wiggins to hold any property in violation of the testator's will under a judgment procured by fraud.[1]

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1 The fraud was constructive, not intentional, although it is true that no one except Mrs. Wiggins or her sisters could have hoped to benefit by the unjust paragraph in the will construction decree. The opinion below overlooks this fact. The Supreme Court of Missouri in its opinion of December 16, 1941, in the *Kennard* case, explicitly said:

> "the challenged paragraph in the will construction suit, under the facts, amounted to a *constructive fraud* upon the rights of [Mrs. Kennard] a minor defendant in that suit. And by such fraud, we mean representations which cause injury to another, although the party making the representations did not intend to deceive" (citing cases here omitted).

This language, on the Court's own motion, has been deleted from the opinion at the request of the attorney who appeared for the guardian ad litem in the will construction suit. The reasons for his request were personal, as he now represents no party in the litigation. In lieu of this language, the Court has said:

> "the challenged paragraph in the will construction suit, under the facts, wrongfully deprived a minor defendant, who is now the present plaintiff, of the possession of the property and the income therefrom as claimed by her in the present cause."

Such change in the Court's language obviously does not militate against the conclusion that the erroneous statements of counsel in the will construction suit appeal amounted to a constructive fraud upon the Court, and does not alter the express holding of the Court that fraud entered into the procurement of the judgment.

(We advise this Court of such change in language of the opinion of the Supreme Court of Missouri in the *Kennard* case pursuant to a stipulation dated December 13, 1941 (R., p. 346). In the *Kennard* case the Supreme Court of Missouri overruled Mrs. Wiggins' first motion for rehearing on December 16, 1941; overruled her second motion for rehearing and her first motion to transfer to the Court en Banc on February 26, 1942; Mrs. Wiggins filed her third motion for rehearing and her second motion to

Petitioner's Effort to Have the Title to Real Estate Determined Under the Will, and the Judgment in the Federal Court Action at Law in Perry vs. Wiggins, Which Refused to Determine Title Under the Will, Does Not Preclude Her From Relief in Equity.

a) Because the issues here of fraud, accident or mistake were not, and could not have been raised in *Perry vs. Wiggins;* and

b) Because, since the decision in *Perry vs. Wiggins,* the Supreme Court of Missouri has invalidated the very judgment which *Perry vs. Wiggins* relied upon as *res adjudicata.*

The majority opinion below asserts that:

"The decision of the Supreme Court of Missouri [in the *Kennard* case] cannot, in any event, affect, in

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transfer to the Court en Banc on March 7, 1942, and the same have not yet been ruled upon.)

The full force of the opinion of the Supreme Court of Missouri in the *Kennard* case can be appreciated only by reading the same in its entirety. But we point out that the Missouri Court has said in the *Kennard* opinion:

"This is an action in separate counts to have declared void, on the alleged ground of fraud, accident or mistake a paragraph in a decree construing a will * * *."

It then holds that the paragraph is not tenable, that "No word juggling as to *remainders,* etc., can, in reason, reach such result."

It then observes:

"* * * there were statements in the briefs, in effect, *contrary* to the construction in the challenged paragraph."

"No judge, by reading the briefs in the will construction suit appeal, *would even suspect* such a construction as that contained in the challenged paragraph of the decree."

"*No point* was made as to the correctness of the construction and *the briefs would suggest that no such construction was made,* * * *."

"Defendant [Mrs. Wiggins], however, says that no fraud, accident or mistake was pleaded or proved that would support the judgment below * * *."

But

"* * * the petition alleged that on appeal in the will construction suit counsel did not advise this court as to the disputed paragraph in the decree, but on the contrary 'the briefs of all counsel' stated 'the intention of the testator to be that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life with remainders over to the heirs of their respective bodies.'

"We think that the pleadings and proof amply support the judgment below, * * *" (Opinion of the Supreme Court of Missouri in *Kennard vs. Wiggins,* R., pp. 356, 363, 364, 366, 369, 370).

any way the binding force and effect of the judgment of the United States District Court in Perry v. Wiggins * * *'' (citing *Deposit Bank vs. Frankfort,* 191 U. S. 499).

a) The judgment at law in *Perry vs. Wiggins* (Phys. Ex., p. *538) sustained the plea that the decree in the will construction suit was *res adjudicata.* The plaintiff (Mrs. McIntosh) in *Perry vs. Wiggins* did not charge, and there could not have charged, that there had been fraud in the procurement of the judgment in the will construction suit. *Perry vs. Wiggins* was an action at law; no issue as to fraud was made or ruled on; the broad powers of Equity were not invoked, and could not have been invoked; they *are* invoked here.

b) The judgment in the will construction suit relied upon as *res adjudicata* in the Federal Court case of *Perry vs. Wiggins,* has now been invalidated because it was procured by fraud.

To give effect to the judgment in *Perry vs. Wiggins* gives effect to the invalid judgment on which it relies. Is Equity powerless in such circumstances? Is it forced to give effect to a judgment procured by fraud merely because that judgment, prior to its invalidation, had been sustained as *res adjudicata* in another Court?

We think that the powers of Equity are not so limited by *Deposit Bank vs. Frankfort, 191 U. S. 499.* We think that the majority opinion below has extended the doctrine of the *Frankfort* case beyond what was intended by that decision, and that the situation calls for an exercise of the supervisory powers of this Court.

Earnestly we contend that Mrs. Kennard, in the Missouri Courts, and Petitioner, in the Courts below, are not

"differently situated" so as to justify denial of relief to Petitioner. It is our conviction that Equity will not permit Respondent to retain any benefits of a judgment procured by fraud, and to retain those benefits in violation of the testator's last will.

Respectfully submitted,

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

I hereby certify that the foregoing Petition for Rehearing, in my opinion, is well founded, and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Paul Bakewell, Jr.,
Attorney for Petitioner.